IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM H. REID,
Petitioner,

vs.

SANDY LYNN NELSON, an infant, by EDNA NELSON, her next friend, EDNA NELSON and EDWIN S. NELSON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of William H. Reid respectfully shows:

This is an action at law brought in the District Court of the United States for the Southern District of Florida by Sandy Lynn Nelson, a minor, and her parents, against the petitioner and his wife, for damages resulting when

a dog owned by your petitioner bit the child. It is a diversity case.

Liability, without regard to negligence, is imposed by a Florida Statute upon the owners of dogs which injure persons or property.

The trial was by jury and resulted in a verdict for the minor child for $2200.00 for pain and suffering, and for the parents for $8550.00 for loss of the child's earnings (R. 223). The Circuit Court of Appeals reversed the judgment of the lower court against petitioner's wife for lack of evidence of ownership of the dog (R. 250 and 253).

No complaint is made here of the verdict for pain and suffering of the child. The petitioner made a motion for a new trial in the District Court upon the ground that the verdict for the parents' loss of the child's earnings was grossly excessive (R. 225) but it was denied. In the Circuit Court of Appeals, two contentions, in the alternative, were advanced by your petitioner:

(a) that there was no evidence upon which a a verdict of $8550.00 could be found by the jury;

(b) that it was the right and the duty of the Circuit Court of Appeals to review the evidence to determine whether the $8550.00 verdict was excessive, and if so, to order a remittitur or a new trial.

The Circuit Court of Appeals ruled against the peti-

tioner upon the first contention, and no complaint is here made of that ruling. The second contention was also overruled and this ruling forms the basis of this petition. The opinion and judgment are dated April 10, 1946. It has not yet been officially reported (R. 249 and 253).

The statutory provision believed to sustain the jurisdiction of this court is Section 347(a) of Title 28 of the United States Code.

In filing this petition, your petitioner realizes he carries a considerable burden. In several cases in this court, it has been held that the 7th Amendment to the Constitution of the United States prevents the review by a Federal appellate court of a jury's verdict. The latest of these cases is **Dimick v. Schiedt**, 293 U. S. 474, in which the history of control by both trial and appellate courts of jury verdicts is rather fully reviewed.

In that case, five justices (Sutherland, McReynolds, Van Devanter, Butler and Roberts) held that the 7th Amendment "froze" the practice of court control over jury verdicts as it existed in the English Courts in 1791. Four justices (Stone, Hughes, Brandies and Cardozo) dissented in an eloquent and forceful opinion delivered by the late Chief Justice. The fundamental ground of the dissent was that the "common law" referred to in the Amendment was not the practice of the English judges of 1791, but a system of a growing and developing body of legal thinking.

The dissenting opinion points out that in no other connection is the phrase "the common law" given so restricted a meaning as that expressed in the majority opin-

ion, and even the majority opinion concedes the rule to be undesirable and adopts it only out of respect for its comparative antiquity.

The dissenting opinion also observes that the so-called rule has been more honored by lip-service than by observance. More recent developments in Federal Court practice, such as Rule 52 relating to the effect of the one-man-jury's findings of fact in jury-waived cases, and Rule 48 dealing with majority jury verdicts, demonstrate that the substance of the "freezing" rule is being gnawed away by a professional dissatisfaction which this court seems to share.

Professional dissatisfaction with the "freezing" rule apparently began shortly after Mr. Justice Story first announced it on Circuit in 1822. Efforts to overthrow or circumvent it have continued up to the present year. If a rule has not gained professional acceptance in 124 years, it is probably a bad rule, and means should be found to change it. This same sort of professional dissatisfaction followed **Swift v. Tyson** and led eventually to **Erie R. R. v. Tompkins.**

Some of the Circuit Courts of Appeal have circumvented the effect of the rule by saying that they have the power to determine whether the trial court had abused its discretion in denying a motion for a new trial based on the excessiveness of the verdict. (**Cobb v. Lepisto,** 6 Fed. (2) 128, and **Department of Water and Power v. Anderson,** 95 Fed. (2) 577). Other circuits have, with the tacit approval of this court, engrafted an exception in "passion and prejudice" cases. **Peitzman v. City of Illmo,**

141 Fed. (2) 956, certiorari denied, 323 U. S. 718, rehearing denied, 323 U. S. 813.

The Fifth Circuit, while following the rule, says:

> "The most an appellate court can do, if it thinks the verdict not according to the weight of the evidence, is to scan the trial more closely for error."
>
> **Home Ins. Co. of New York v. Tydal Co.**, 152 Fed. (2) 309.

The rather vague content of phrases like "passion and prejudice" or "abuse of discretion" or "harmless error" is such that it takes no great mental agility to fit into these categories almost any case in which the Appellate Court feels that injustice is being perpetrated by a jury's verdict.

It is by this petition suggested that the views of the majority of the court in **Dimick v. Schiedt** should be rejected and that the views of the four dissenting justices should be adopted as the views of this court.

Such a ruling would be consistent with that form of mental honesty which prefers openly to discard an outmoded or undesirable rule of law, rathen than to riddle it with enervating exceptions and distinctions until its substance has disappeared.

This petition further suggests that the right to an appellate review is a matter of substantive law, not merely one of procedure, and that an appellate review should ex-

tend to all phases of a law suit which materially affect the rights and duties of the parties. Certainly the amount a defendant has to pay materially affects him.

Under **Erie R. R. Co. v. Tompkins,** 304 U. S. 64, Federal Courts, in diversity cases, administer the law of the states in which they sit. If this identical law suit has been tried in the courts of Florida, the appellate court of that state would have had the right and duty to review the evidence to determine whether the verdict was excessive. By the accident of diversity of citizenship, and that alone, this case is in a Federal court, and your petitioner has been denied a right he would have had in the State court.

There is no element of consent on the part of the petitioner. This suit was not removed from the State court. It was originally filed in the Federal Court.

Every evil and every logical inconsistency that led to the decision in **Erie R. Co. v. Tompkins** exists in this case, and every motive that impelled that decision impels a reversal here.

If the "freezing" rule of **Dimick v. Schiedt** be rejected, then the "common law" of the 7th Amendment becomes the common law of the state in which the court sits and the amount which your petitioner must pay to discharge his liability will be determined in the same way it would be in the courts of the state which created that liability.

The Circuit Court of Appeals refused to consider the evidence to determine whether the verdict was excessive.

Your petitioner submits that the writ of certiorari should be granted as prayed.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 11,448, William H. Reid and Jessie Reid, Appellants, versus Sandy Lynn Nelson, an infant, by Edna Nelson, her next friend, Edna Nelson and Edwin S. Nelson, Appellees, to the end that this cause may be reviewed and determined by this Court, as provided for by the Statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated the ..... day of May, 1946.

JAMES A. DIXON,
Attorney for Petitioner,
908 First National Building,
Miami, Florida.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 126

WILLIAM H. REID,

Petitioner,

versus

SANDY LYNN NELSON, an Infant, by EDNA NELSON, Her Next Friend, EDNA NELSON and EDWIN S. NELSON,

Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

HAROLD B. WAHL,
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Jacksonville 2, Florida,
Attorney for Respondents.

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CITATIONS.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 246 et seq.) was handed down on April 10th, 1946, and is reported at 154 Fed. 2d 724.

JURISDICTION.

The Judgment of the Circuit Court of Appeals was entered April 10th, 1946 (R. 249) and the Petition for Writ of Certiorari was docketed May 28, 1946. Petitioner seeks to invoke the jurisdiction of this Court under 28 U. S. C. A. 347 (a).

QUESTION PRESENTED.

Where There is Unquestionably Evidence to Support a Jury Verdict, the Trial Judge Has Denied Motion for New Trial, and the Circuit Court of Appeals Has Affirmed, Will This Court Grant Certiorari to Go Into the Question of Alleged Excessiveness of the Verdict?

We say not,[1] because:

I. This court for a great many years (Pet. 4) has consistently held that "the question whether the verdict is excessive or not is exclusively for the trial court to determine and is not subject to be reviewed in any Federal Court."

II. Under *Erie v. Tompkins*, 304 U. S. 63, apparently relied on by Petitioner, State law is applied in diversity cases "*except* where the *Constitution*, treaties or *statutes* of the United States otherwise require or provide," and

(1) The Seventh Amendment to the Constitution provides that "no fact tried by a jury shall be other-

[1] As observed by this Court on June 3, 1946, in Prudential Ins. Co. v. Benjamin, infra, "Merely to state the position in this way compels its rejection". The Petitioner does not formally state the question. (Pet. 2, 3.)

wise re-examined in any Court of the United States, than according to the rules of the common law". (See *Dimick v. Schiedt*, 293 U. S. 474.)

(2) The Code, 28 U. S. C. A. 879 (8 F. C. A. Title 28, Sec. 879) provides there shall be no reversal on appeal "for any error in fact". (See *Fairmont Glass Works v. Coal Company*, 287 U. S. 474, 481.)

III. Even under the dissenting opinion in *Dimick v. Schiedt, supra,* apparently relied on by Petitioner, the dissenting Justices at 293 U. S. 489, fully recognize the rule that "the exercise of judicial discretion in denying a motion for new trial, on the ground that the verdict is too small or too large, is not subject to review on writ of error or appeal".

IV. Were the evidence to be examined it would reflect ample support for the size of the verdict. The mother of a child model, who had an established profession as a model *even before her first birthday at $5.00 per hour* (and as conceded by Petitioner in the Court below, was about to go up to $7.50 per hour at the time of the accident), who earned $600.00 in the year before the accident, and whose career as a model was ended by the injuries inflicted by the attack of Petitioner's huge hound, was allowed $8550.00 (for loss of earnings and medical bills), which amount only approximated 1100 hours or slightly more than *one hour per week* at $7.50 per hour for the remaining 18 years of the child's minority.

STATUTE INVOLVED.

While Petitioner refers to no statute, we think 8 F. C. A. Title 28, Sec. 879 a complete bar to granting of the Petition. That Statute, providing that there shall be no reversal on appeal *"for any error in fact"*, is quoted in full and discussed under Point II, page 7, *infra.*

STATEMENT OF THE CASE.

A child model was attacked by Petitioner's 60-pound Dalmatian Hound (R. 35, 58, 108, 122, et seq.) and severely injured. Although there was no question as to liability [2] and the sole question was the amount of the damages, Petitioner refused to settle. He insisted that a jury was the proper body to assess the damages. Accordingly, the case went to trial. The jury verdict was $2200.00 to the child for pain and suffering, and $8550.00 to the mother for the child's medical expenses and loss of earnings during minority (R. 223 and Pet. 2). The Petitioner makes no complaint about the $2200.00 for the child [3] (Pet. 2) but does complain of the $8550.00 allowed the mother.

The Petitioner appealed to the Fifth Circuit on two grounds, as stated in his petition (Pet. 4), i. e., that there

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[2] See Section 767.01 Florida Statutes, 1941, (R. 247) and the decision of the Florida Supreme Court in Ferguson v. Gangwer, 1939, 192 Sou. 196, which, as the Fifth Circuit put it, "makes the liability of the owner of a dog absolute for any damage done by it to persons or domestic animals". (R. 247.) Petitioner concedes this. (Pet. 2.)

[3] This $2200.00 is undoubtedly too little for the serious injuries sustained by the child, but, unfortunately, the verdict of the jury finally settled that question, just as the verdict settled the question of the mother's damage.

was no evidence to support the verdict, or in the alternative that the appellate court should cut the verdict down as excessive.

The Circuit Court of Appeals ruled against him on both counts, and he now attempts to get this Court to go into the question of alleged excessiveness of the verdict.

The question of the amount of the judgment is foreclosed by the verdict of the 12-man jury and the action of the trial judge in denying the motion for new trial. But even if Petitioner succeeded in getting the Court to overturn all past precedents and go into the question of the amount of the verdict, the verdict is amply supported by the evidence.

Sandy Lynn Nelson, the child, had an established profession as a child model *at $5.00 per hour even before her first birthday,* with two agents handling her career (R. 158, 159). These two agents (R. 98 et seq., R. 104 et seq.), and her photographer (R. 94 et seq.) testified at the trial.

She had actually earned $600.00 during the year prior to the accident when she was between 2 and 3 years old (R. 165). Prior to the trial, in response to interrogatories, Petitioner was furnished with a detailed statement giving the names and addresses of the various concerns in New York for whom the child had modeled during this year with the amounts paid by them (R. 25). She was just about to go up to the $7.50 per hour rate (R. 159). Petitioner not only conceded this in oral argument before the Fifth Circuit but conceded that she would have made

$900.00 in the year between the accident and the trial. It is undisputed that the injuries, scars and neurosis, caused by the attack of this huge dog on the child one-half his size, have ruined her career as a model and that the child has earned nothing since the accident. (R. 165.)

ARGUMENT.

I. This Court for a Great Many Years (Pet. 4) Has Consistently Held That "The Question Whether the Verdict is Excessive or Not is Exclusively for the Trial Court to Determine and Not Subject to be Reviewed in Any Federal Court."

There is little need to argue this point, for the entire petition concedes that it seeks to overturn a precedent consistently followed by the Court for a great many years[4] (Pet. 3, 4, et seq.).

We quote merely what this Court had to say in *Fairmont Glass Works v. Coal Company*, 287 U. S. 474, 481, 77 Law Ed. 439, 443:

> "The rule that this court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury

[4] It would be ironic, indeed, for this court to continue to hold final the finding of an administrative board (even though the evidence on which it is based be that of "experts" employed by the board itself), and yet deny finality to the facts found by the verdict of a 12-man jury and approved by the trial court. (See the very recent 1946 cases cited under Point IV, page 18, infra.)

were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals. Its *early* formulation by this Court was influenced by the *mandate of the Judiciary Act of 1789,* which provided in Sec. 22 that there should be *'no reversal* in either (circuit or Supreme) court on such writ of error . . . *for any error in fact'*. Sometimes the rule has been rested on that part of the Seventh Amendment which provides that 'no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.' *More frequently* the reason given for the denial of review is that the granting or refusing of a motion for a new trial is a matter within the discretion of the trial court." (Italics ours.)

It will be observed that the Seventh Amendment (the only reason mentioned by Petitioner) is but one of *several* reasons for the rule.

II. Under Erie v. Tompkins, 304 U. S. 63, Apparently Relied on by Petitioner, State Law is Applied in Diversity Cases EXCEPT "Where the CONSTITUTION, Treaties or STATUTES of the United States Otherwise Require or Provide", and

(1) The Seventh Amendent to the Constitution provides that "no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law". (See *Dimick v. Schiedt,* 293 U. S. 474.)

(2) The Code (28 U. S. C. A. 879, 8 F. C. A. Title 28, Sec. 879) provides there shall be no reversal on appeal

"for any error in fact". (See *Fairmont Glass Works v. Coal Company*, 287 U. S. 474, 481.)

Judging from his oral argument[5] before the Fifth Circuit, Petitioner's primary contention is that under the rule of *Erie v. Tompkins*, 304 U. S. 63, 82 Law Ed. 1188, the Federal Court should follow the Florida Court where Petitioner contends, *but without citing any authorities at all to support the contention*, that "the appellate court of that state would have had the right and duty to review the evidence to determine whether the verdict was excessive." (Pet. 6.)

In the first place even a casual reading of the *Erie* case shows that state law has no application "where the Constitution, treaties or Statutes of the United States otherwise require or provide". (See 304 U. S. 71.)

As the Fifth Circuit pointed out in its opinion below, (R. 248) Federal Appellate Courts lack jurisdiction to consider alleged excessiveness of jury verdicts because of the Seventh Amendment, and the decision in the *Erie* case "could not have the effect of requiring this Court to follow the State court in disregard of the Seventh Amendment" (R. 248).

Petitioner recognizes that this Court has consistently held that the Seventh Amendment "prevents the review

[5] We advert to Petitioner's *oral argument* for the reason that his present theory was not mentioned in his briefs below. It was first evolved at the bar of the Fifth Circuit, and the petition here is but a condensation of that oral argument. See United States v. Causby, ... U. S. ..., 90 Law Ed. Adv. Sh. ..., decided May 28, 1946, as to weight accorded concessions made on oral argument.

by a Federal Appellate Court of a jury's verdict". (See page 3 of his petition.)

In the next place, the United States Code itself, 8 F. C. A., Title 28, Sec. 879 (28 U. S. C. A. 879) specifically provides:

> "REVERSAL ON FORMER ERROR LIMITED—There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, *or for any error in fact.* (R. S. Sec. 1011; Feb. 18, 1875, c. 80, Sec. 1, 18 Stat. 318.)
>
> "R. S. Sec. 1011, from Act Sept. 24, 1789, c. 20, Sec. 22, 1 Stat. 84; Act Mar. 2, 1803, c. 40, Sec. 2, 2 Stat. 244.
>
> "EXPLANATORY NOTE—Writ of error has been abolished and appeal substituted therefor. See Secs. 861a and 861b of title."

The above section of the code alone is complete answer to the Petitioner's attempted application of the *Erie* case, for under this section of the Code there can be no reversal on appeal *"for any error in fact"*. See the great host of cases cited to this section in both U. S. C. A. and F. C. A. to the effect that this section of the code prohibits consideration on appeal of a contention that the verdict is excessive.

The only answer that Petitioner could make to this section of the statute before the Fifth Circuit was that it had been repealed, an allegation of fact not recognized by

this Court in 1933 when it handed down the decision in *Fairmont Glass Works v. Coal Company, supra,* nor by the Eighth Circuit when that court specifically referred to and followed the statute in *Pietzman v. City,* (CCA Mo. 1944) 141 Fed. 2nd 956, 963, cited on page 4 of the Petition.

To the same effect see *Miller v. Maryland Casualty Company* (CCA. N. Y. 1930) 40 F. 2d 463, 465.

We have checked with both the Mason Publishing Company, publisher of F. C. A., and the West Publishing Company, publisher of U. S. C. A., who confirm the result of our own research that Section 879 has *not* been repealed and is still the law.

Attention is invited particularly to Sections 861(a), 861(b), and 880 [6] of the same title 28.

As stated in *Fairmont Glass Works v. Coal Company, supra,* the principles contained in Section 879 have been the statute law ever since the enactment of Section 22 of the Judiciary Act of 1789, providing that there should be *no* reversal on appeal *"for any error in fact".*

Erie Doctrine Not Applicable to Procedure.

Finally, and we do not labor the point, we doubt Petitioner's "suggestion" that the *Erie* case has any applica-

[6] 28 U. S. C. A. 880 reads: "Appeals from District Courts shall be subject to the same rules, regulations and restrictions as were prior to January 31, 1928, prescribed in law in cases of writs of error". Sections 861(a) and (b) simply substitute appeal for writ of error and provide that the statutes governing writs of error shall apply to appeals.

tion to the question of what is to be considered on appeal. Is not this a procedural point rather than one of substantive law? Compare the Federal Rules of Civil Procedure (under which the Conformity Act no longer controls), and the various Federal Statutes regulating procedure on appeal.

Petitioner apparently urges the *Erie* case as authority for blind adherence [7] to state law irrespective of the Constitutional provisions, Federal Statutory requirements and everything else. Judge Charles E. Clark has prepared a most illuminating article published in the February 1946 issue, Volume 55, of the *Yale Law Journal*, pages 267 et seq., entitled *"State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins"*. We particularly invite attention to pages 288, 289, et seq., where Judge Clark points out the practical difficulties barring any such blind adherence as suggested by Petitioner, even if the Federal Constitution and Statutes (hereinabove discussed) did not stand in the way.

Suppose the State Rule did not permit any appeal at all.

Would the Federal Circuit Court of Appeals be precluded from entertaining an appeal? Or, if the State granted two appeals as of right, would there be a second appeal to the Supreme Court as of right? The answers

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[7] What was said by this Court on June 3rd, 1946, (the week this brief goes to the printer) in Prudential Insurance Company v. Benjamin, ... U. S. ..., 90 L. Ed. Adv. Sh. ..., in rejecting an attempt to over-extend a previous decision of the Court, is applicable to Petitioner's attempt unduly to extend here the doctrine of the Erie case. We quote:

"When a decision is conceived as precedent-smashing, rightly or wrongly, the conception's invitation may be to *greater backtracking than is justified, in spite of warning to proceed with care*".

are obviously in the negative and illustrate why the *Erie* case does not and cannot apply as urged by Petitioner.

III. Even Under the Dissenting Opinion in Dimick v. Schiedt, Supra, Apparently Relied on by Petitioner, the Dissenting Justices at 293 U. S. 489, Fully Recognized the Rule That "The Exercise of Judicial Discretion in Denying a Motion for New Trial, on the Ground That the Verdict is Too Small or Too Large, is Not Subject to Review on Writ of Error or Appeal".

Petitioner's apparent reliance on the *dissenting* opinion in *Dimick v. Schiedt*, 293 U. S. 489, 79 Law Ed. 612, is hard for us to understand in view of the following quotation from such *dissenting* opinion (page 489):

> "As a corollary to these rules is the further one of the common law, long accepted in the federal courts, that *the exercise of judicial discretion in denying a motion for a new trial, on the ground that the verdict is too small or too large, is not subject to review on writ of error or appeal*[8] (Citing cases). This is but a special application of the more general rule that an appellate court will not re-examine the facts which induced the trial court to grant or deny a new trial. (Citing cases.)

See also page 493 of the *dissenting* opinion:

> "* * * the denial of a new trial may not be reviewed upon appeal (citing cases) * * *."

How, in the face of these *verbatim* quotations from the dissenting opinion, Petitioner can assert it in support of

[8] Italics here and elsewhere throughout this brief are ours unless otherwise indicated.

his position requires considerable explanation (explanation not so far offered by Petitioner).

Moreover, as the Court below pointed out at the oral argument in response to Petitioner's reliance on the *Dimick* dissent, not only is he relying on a *dissenting* opinion but that case did not involve directly the appellate review of the excessiveness of the verdict. The Court considered the question of whether the *trial judge* could, with the assent of defendant and against the will of plaintiff, deny motion for new trial on condition the judgment be *increased*. The majority opinion simply held that even though the *trial* court could order a remittitur as a condition of denying new trial, he had no corresponding power to increase the verdict. The dissent argued the *trial* judge should have power to increase the verdict of the jury as a condition of denying motion for new trial.

IV. Were the Evidence to be Examined it Would Reflect Ample Support for the Size of the Verdict. The Mother of a Child Model, Who Had an Established Profession as a Model Even Before Her First Birthday at $5.00 Per Hour (and, as Conceded by Petitioner in the Court Below, Was About to Go Up to $7.50 Per Hour at the Time of the Accident), Who Earned $600.00 in the Year Before the Accident, and Whose Career as a Model Was Ended by the Injuries Inflicted by the Attack of Petitioner's Huge Hound, was Allowed $8550.00 (for Loss of Earnings and Medical Bills), Which Amount only Approximated 1100 Hours or Slightly More Than ONE HOUR PER WEEK at $7.50 Per Hour for the Remaining 18 Years of the Child's Minority.

The thing that amazes us most is why the Petitioner's Counsel picked this particular case as the vehicle by which they attempt to overturn the long established rule that excessiveness of verdicts cannot be gone into on appeal in the Federal Courts. The facts here are so strong that even if the Court re-examined the case it could do nothing other than affirm the verdict.

Here is a case where a child was so brutally and seriously injured by the attack of this huge dog (R. 35, R. 58) that extensive medical care was required—three doctors in Miami, two in the child's home in New Jersey, and two specialists in New York and New Jersey (R. 156, 157). Four of the doctors testified at the trial (Dr. Izlar, R. 71 et seq., Dr. Aufricht, R. 87 et seq., Dr. Cracco, R. 184 et seq., and Dr. Stockfisch, R. 186, et seq.). The child was examined by Petitioner's doctor during the first day of the trial (R. 212). The best evidence that Petitioner conceded the correctness of the testimony of Respondent's doctors as to the extent of the injuries and their effect on the child's future, as a model, is the fact that Petitioner did not put his own doctor on the stand (R. 212). He was obviously afraid to have the jury hear what his own doctor thought about the *child's future as a model* in the light of these injuries.

Because of her unusual photogenic characteristics, this child had an established profession as a model even before her first birthday (R. 158, 159). Respondents offered in evidence modeling pictures taken from the age of seven or eight months onward (R. 159, 161, 163, et seq.).

There is no dispute that the child earned $600.00 during the year prior to the injury (R. 165); that her modeling career was steadily increasing (R. 159, 170); that she was about to go up to the $7.50 per hour bracket (R. 159); that child models like Sandy usually continue and progress in their work into young girls and then adult modeling (R. 170), their earnings constantly increasing, but that because of her injuries Sandy had been unable to do any modeling and had earned nothing since the accident. (R. 165.) The testimony further showed that because of the neurosis growing out of the attack by the dog she has become nervous and irritable, is no longer tractable, and now does not have the qualities of patience and obedience which are considered essential by the artists and photographers using a child model (R. 165).

Sandy awakens in the night because of nightmares (R. 54, 75), and is afraid of animals and insects (R. 49). Instead of being the quiet docile child she formerly was she is now nervous, irritable and difficult to handle (R. 75, 165). Because of this change in disposition and because of the scar she is no longer suitable as a model (R. 165).

The trial judge and the jury had ample opportunity to see and observe Sandy, which opportunity an Appellate Court does not have. One of the Petitioner's witnesses, a professional photographer, (R. 203) examined the child under a strong light in front of the jury. When the Petitioner's witness put the child under the strong light, it immediately became apparent to everyone in the court room why the scar disqualified her for future photographic modeling. The scar stood out like a beacon light. Here

is a perfect example why an Appellate Court on a cold printed record will not overturn facts established to the satisfaction of the jury which had the witnesses themselves before it.

The various witnesses explained why certain scars were caught by the camera and why people who used models were not willing to employ models who had such defects requiring doctoring up of the pictures before they could be used. (R. 165, 101, 96, 107.)

The jury heard testimony for two days, retired to the jury room, deliberated for better than two hours, and then brought in the verdict which included that part here complained of, i. e., $8550.00 to the mother for the child's medical care and other out of pocket expense and loss of earnings. When it is realized that the child had almost 18 years between the time of the accident and her majority and that it would only take approximately 1100 hours at $7.50 per hour to produce $8550.00, it can be appreciated how reasonable the jury was on the question of loss of future earnings. *The child would have to lose only slightly over an hour a week—perhaps ten minutes a day—to make up the amount of the verdict.*

Petitioner's counsel argued, at the bar of the Fifth Circuit, that $600.00 was the amount the child earned during the year before the accident, and that $900.00 was a proper figure for loss of earnings for the year between the accident and the trial. He took the same number of hours as the year before but multiplied by the new $7.50 rate. He did not allow for any increase in hours, as he

should have done. Naturally as the child grew older and more experienced the demand for her services would increase. He then argued that this $900.00 taken from the $8550.00 allowed by the jury still left too much for medical expenses and for the remaining loss of earnings, and that it should be cut down by remittitur. He argued that children reached the "in between" stage during which this child would not have any earnings, to which the Court replied that the alleged "in between stage" would not last indefinitely. Deducting the $900.00 conceded by Petitioner for the first years' loss of earnings, leaves about $7500.00 to be spread over 17 years. At the rate of $900.00 per year conceded by Petitioner for the first year after the accident, it would require less than half the 17 years to produce $7500.00 and this takes no account of progress and greater earnings as the model's career unfolds. Spread over the entire period, as heretofore observed, it would only require 1100 hours at $7.50 per hour to make up the entire verdict, or about an hour a week.

As stated by the Ninth Circuit in *Hazeltine v. Johnson*, (Mont. 1937) 92 Fed. 2d 866, 869:

> "It is the general rule that in the absence of direct evidence of the loss of earnings resulting from injuries to or the death of those of tender years, the amount of recovery is left to the sound judgment and experience of the jury. Waters-Pierce Oil Co. v. DeSelms, 212 U. S. 159, 181, 29 S. Ct. 270, 53 L. Ed. 453; Burns v. Eminger, 84 Mont. 397, 276 P. 437. The jury had before it, the boy himself, together with the evidence as to his age, his present and previous condition of health, and other factors upon which the estimate of witnesses concerning any impairment of his earning capacity would necessarily have to be based.

> "The jurors were in as favorable position as any witness would be to reach a conclusion on this subject."

See also what this Court had to say on the same question in *Waters-Pierce Oil Company v. DeSelms,* 212 U. S. 159, 181, 182, 53 Law Ed. 453, 464.

If the amount of the recovery was left to the jury in those cases where there was no evidence at all as to earnings of the child, how much more is the question for the jury here with all the evidence available as to the profession of the child and her actual earnings, plus the concessions made at the bar of the Circuit Court of Appeals by counsel for Petitioner.

Petitioner contends (at pages 4 and 5 of his petition) that the Circuit Courts of Appeals have "circumvented the effect of the rule", engrafting an exception in "passion and prejudice" cases, and in an effort to get away from the rule "scan the trial more closely for error". If this be true, the fact that the Fifth Circuit here did not "circumvent" the rule, discovered no "passion and prejudice", and was unable to find any "error" as to Petitioner, is a good indication that the verdict was justified.

During the present calendar year this Court on numerous occasions has reaffirmed the doctrine that it could not re-examine questions of fact found by the jury, and that the jury's determination is final.

See *United States v. Johnson,* ... U. S. ..., 90 Law Ed. Adv. Sh. 389, 391, decided February 4, 1946, and *Bigelow*

v. RKO Radio Pictures, ... U. S. ..., 90 Law Ed. Adv. Sh. 579, 585, decided February 26th, 1946.

And on March 25th, 1946, in *Lavender v. Kurn,* ... U. S. ..., 90 Law Ed. Adv. Sh. 692, 696, 697, the Court held:

> "It is no answer to say that the jury's verdict involves speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjection is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, *the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent,* it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable."

CONCLUSION.

The verdict of the jury and the action by the trial court in denying motion for new trial settled the question of the amount of the verdict. This court has so held for many years. In seeking to overturn this long established rule, the Petitioner relied, first, on the *Erie* case, which is expressly not applicable because of the Seventh Amend-

ment and the Code (28 U. S. C. A. 879). Next he relies on the *dissenting* opinion in *Dimick v. Schiedt.* Not only is this a dissenting opinion rather than the controlling law contained in the majority opinion, but this dissenting opinion squarely states that excessiveness of verdict cannot be gone into on appeal.

And, in addition to everything else, the size of the verdict is fully supported by the evidence.

We respectfully submit that petition for certiorari should be denied.

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